

Supreme Court, U. S.

FILED

NOV 14 1979

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1862

FRED N. WALKER,
Petitioner,

VERSUS

ARMCO STEEL CORPORATION,
Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Tenth Circuit**

BRIEF OF PETITIONER

MANNERS, CATHCART & LAWTER
By DON MANNERS
1510 North Klein
Oklahoma City, Oklahoma 73106
Counsel for Petitioner

November, 1979

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The opinion of the United States Court of Appeals for the Tenth Circuit, 529 F.2d 1133, appears at page A-11 of the Appendix. The opinion of the United States District Court for the Western District of Oklahoma, 452 F.Supp. 243, appears at page A-7 of the Appendix.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment in this case on February 14, 1979. Application for Extension of Time to File a Petition for Writ of Certiorari was granted on May 16, 1979, extending the time to June 14, 1979. The Petition for Writ of Cer-

triorari was timely filed on June 14, 1979. This Court granted certiorari on October 1, 1979, invoking jurisdiction under 28 U.S.C. 1254(1).

APPLICABLE STATUTORY PROVISIONS

Federal Rules of Civil Procedure, Rule 3, Commencement of Action: "A civil action is commenced by filing a Complaint with the Court."

Oklahoma Statutes Annotated, Title 12, Section 97 (West Supp. 1978): "An action shall be deemed commenced, within the meaning of this Article, as to each defendant, at the date of the summons which is served on him or a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to commencement thereof, within the meaning of this Article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons within sixty (60) days."

QUESTION PRESENTED FOR REVIEW

In a diversity action, should a federal district court follow Rule 3 of the Federal Rules of Civil Procedure or State law, in determining when an action is commenced for the purpose of tolling a statute of limitations?

STATEMENT OF THE CASE

Petitioner was seriously injured on August 22, 1975, when a nail head fragment lacerated his right eye. This particular nail, manufactured by respondent, shattered while petitioner was trying to drive it into a cement wall. As a result of the accident, petitioner, pursuant to Rule 3 of the Federal Rules of Civil Procedure, commenced a lawsuit by filing the Complaint on August 19, 1977, in the United States District Court for the Western District of Oklahoma.

On December 1, 1977, respondent was properly served with process, and on January 5, 1978, respondent filed a Motion to Dismiss plaintiff's complaint for the reason that the Statute of Limitations barred the action.

Respondent's Motion to Dismiss was sustained by United States District Court Judge Ralph Thompson on April 18, 1978. On February 14, 1979, the United States Court of Appeals for the Tenth Circuit affirmed the decision, basing its ruling on the holding in the case of *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949). The Supreme Court of the United States, on October 14, 1979, granted certiorari.

SUMMARY OF ARGUMENT

In a diversity action, a federal district court should follow Rule 3 of the Federal Rules of Civil Procedure, rather than state law, in determining when an action is commenced for the purpose of tolling the statute of limitations.

ARGUMENT

This case is the latest in a line of cases in which the Supreme Court of the United States has been asked to decide whether federal or state law should be applied by a federal court in an action based on diversity of citizenship. The line of cases began in 1938 in *Erie v. Tompkins*, 304 U.S. 64. In *Erie*, the Court gave the broad command that federal courts are to apply state substantive law and federal procedural law.

Subsequent cases clarified the distinction between procedure and substance. *Guaranty Trust Company of New York v. York*, 326 U.S. 99, made it clear that problems encountered in *Erie*-type cases were not to be resolved using any traditional dichotomy of substance and procedure.

"And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is * * * does it significantly affect the result of a litigation for a federal Court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court?" 326 U.S., at 109.

In 1949, this Court was faced with a direct confrontation between the Federal Rules of Civil Procedure and a state statute in *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530. *Ragan* involved a diversity action that had been brought to recover damages for personal injuries occurring in the State of Kansas. The Complaint had been filed within the applicable statute of limitations under Kansas law. However, the summons was not served on the defendant until after the time period had

expired. The Kansas statute of limitations, much like the Oklahoma statute being construed in the case at bar, provided that an action would be deemed commenced at the time the summons was served. The Supreme Court held that even though the plaintiff had complied with Rule 3 of the Federal Rules, the action was nevertheless barred. The Court reasoned that:

"Where local law qualifies or abridges it, the Federal Court must follow suit. Otherwise there is a different measure of the cause of action in one Court than in the other, and the principle of *Erie v. Tompkins* is transgressed." 337 U.S., at 533.

Sixteen years later in *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court was faced with a direct conflict between Rule 4(d)(1) of the Federal Rules of Civil Procedure and a state law governing service of process. In *Hanna*, a diversity suit had been timely filed in a Massachusetts Federal District Court. Service of process was made pursuant to Rule 4(d)(1) by leaving copies of the summons and Complaint with a defendant's wife at his residence. The defendant asked the court to dismiss the action because the service of process was contrary to state law which required "in hand" delivery of the summons to the defendant. The District Court relied on *Ragan* and granted Summary Judgment to the defendant. The Supreme Court of the United States reversed, and this time the Court did not apply the state law. The Supreme Court held that the adequacy of service should have been determined by applying the Federal Rule. The Court stated that:

". . . The adoption of Rule 4(d)(1) designed to control service of process in diversity actions, neither

exceeded the Congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service . . ."

Chief Justice Warren, in the *Hanna* opinion, wrote:

"(I)t cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York*, were created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing State-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." 380 U.S., at 473-474.

For almost two decades now, the validity of the *Ragan* decision has been questioned by Federal Courts across the land. Did the Supreme Court overrule *Ragan* by holding in *Hanna* that a Federal Rule, rather than any contrary State provision, should be applied if valid and in point? That question remains a matter of conflict and hopefully will be resolved by the Court in the case at bar. Some courts have held that *Hanna* overruled the *Ragan* rule while others have continued to apply *Ragan* as good law.

The former view was adopted by the Court of Appeals for the Second Circuit in *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598 (2d Cir. 1968). In that case, the court had to determine which definition of commencement applied. If the principles of *Ragan* were followed the court would have been forced to hold that the State definition of commencement was applicable and, as a result, the action was barred. The District Court held that *Hanna* overruled

Ragan and that the action was commenced within the period of limitations under Rule 3. The Second Circuit affirmed the lower opinion and refuted any notion that the application of Rule 3 would result in forum shopping and any inequitable administration of the law. The court said:

"Application of Rule 3, rather than the New York rule, will not so change the character or result of the litigation as unfairly to discriminate against citizens of New York. While the actual outcome of litigation may in a few instances, as here, be different, it is clear that the character of the litigation will not be greatly changed . . ." 398 F.2d at 606.

The Sixth Circuit has also held that *Ragan* was overruled by *Hanna*. In *Smith v. Peters*, 482 F.2d 799 (6th Cir., 1973), the court held that, "The District Court erred in holding that the manner of commencement of an action in the Federal Courts is an outcome determinative question which a Federal Court, under *Erie R.R. v. Tompkins*, supra, is required to determine under state, rather than federal law. . . . It is purely procedural, and does not relate to the substantive issues of the case. . . . This question, however, was set to rest by the Supreme Court in *Hanna v. Plumer*." 482 F.2d, at 801.

In *Grabowski v. United States*, 294 F.Supp. 421 (D. Wyo. 1968), the court held that Rule 3, rather than the Wyoming Rules of Civil Procedure, determined when an action for wrongful death commenced.

"Under the rule of *Hanna v. Plumer* . . . the Federal Rule is the standard against which the District Court must determine when the action commenced. While the case of *Hanna v. Plumer* does not expressly

overrule *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, I'm inclined to construe as a mandate the reasoning and conclusion in the *Hanna* case. I find, therefore, that Rule 3 of the Federal Rules of Civil Procedure is controlling in the instant cases."

In *Wheeler v. Standard Tool & Manufacturing Co.*, 311 F.Supp. 1177 (S.D.N.Y. 1970), an action to recover damages for personal injury would have been timely commenced under Rule 3. However, if the court applied New York law, the action would have been barred by the statute of limitations. The District Court held that Rule 3 applied and stated:

"We believe that the present case is governed by *Hanna and Sylvestri* . . . Use of Rule 3 as the proper measure to decide if the action was commenced here for the purpose of determining whether the claim has been asserted prior to the expiration of the New York statute of limitations would not result in forum-shopping. When the plaintiff filed her complaint . . . , she had the choice of commencing the action either in the State Court or the Federal Court and was not forced to resort to the Federal Court because of inability to effectuate service of summons prior to the expiration of the three year statute of limitations.

"It is also readily apparent that application of Rule 3 here does not substantially alter the character or outcome of the litigation from the consequences that would follow in the State Courts." 311 F.Supp., at 1180.

Many other courts have looked to federal law for a definition of the term "commencement of an action in the Federal Courts." See *Alford v. Whitsel*, 52 F.R.D. 327 (N.D. Miss., 1971); *McCrea v. General Motors Corp.*, 53 F.R.D. 384 (D. Mont. 1971); *Newhart v. George F. Hellick Coffee*

Company, 325 F.Supp. 1047 (E.D. Pa., 1971); *Newman v. Freeman*, 262 F.Supp. 106 (E.D. Pa. 1966), and *Ingram v. Kumar*, 585 F.2d 566 (2d Cir., 1978).

In one of the latest decisions on the question presented in this case, District Judge Charles R. Richey, wrote in *Manatee Cablevision Corp. v. Pierson*, 433 F.Supp. 571 (D. D.C., 1977), "This Court joins those authorities which have concluded that *Ragan* has been substantially overruled by *Hanna* and that Rule 3 governs the commencement of actions in Federal Court for the purposes of statutes of limitation."

Other courts have limited the effect of *Ragan* in questioning the validity of the case. In *Prashar v. Volkswagen of America, Inc.*, 480 F.2d 947 (8th Cir., 1973), cert. denied, 415 U.S. 994 (1974), the court noted that the court in *Ragan* had specifically considered the fact that under Kansas law the commencement of actions was an integral part of the statute of limitations. Finding this factor crucial, the Eighth Circuit sidestepped *Ragan* and held that the South Dakota commencement of actions statute at issue in *Prashar* was not an integral part of the State's statute of limitations.

Other decisions have reluctantly followed *Ragan* while expressing a preference for the Federal Rule. In the Tenth Circuit opinion in the case at bar, Judge Doyle, speaking for the court, remarked that "The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between *Ragan* and *Hanna*." In fact, Judge Doyle parenthetically remarked that he preferred the federal rules. At the very least, *Hanna* and subsequent decisions have cast doubt on the continuing

validity of *Ragan*. If *Hanna* overruled *Ragan*, all questions dealing with commencement should be resolved by looking to Rule 3.

Much of the language in the *Hanna* opinion would seem to point away from the holding of *Ragan*. However, the Supreme Court in *Hanna* did not explicitly overrule *Ragan*. On the contrary, in its opinion, the Supreme Court distinguished *Ragan* in two separate places. As a result, many Federal Courts have held that *Ragan* is still valid. See *Groninger v. Davison*, 364 F.2d 638 (8th Cir., 1966); *Anderson v. Papillion*, 445 F.2d 841 (5th Cir., 1971); and *Witherow v. Firestone Tire & Rubber Co.*, 530 F.2d 160 (3rd Cir., 1976).

Although it would appear that the Supreme Court in *Hanna* avoided overruling *Ragan*, it could be argued that the general approach followed by the Court points to a desirability of applying Rule 3 in diversity cases. The majority in *Hanna* emphasized that there was a need for the federal system to fashion rules of procedure to be followed by the federal judiciary even though the "mode of enforcing state-created rights" might be altered. If Rule 3 was applied in all cases coming before the Federal Courts, uniformity in federal procedure would be greatly enhanced and the undesirable necessity of having to make a number of distinctions between different cases in order to determine when an action was commenced would be avoided.

Petitioner points to Mr. Justice Harlan's concurring opinion in *Hanna*, to state his case:

"I think that the decision (*Ragan*) was wrong. At most, application of the Federal Rule would have

meant that potential Kansas tort defendants would have to defer for a few days the satisfaction of knowing that they had not been sued within the limitations period. The choice of the Federal Rule would have had no effect on the primary stages of private activity from which torts arise, and only the most minimal effect on behavior following the commission of the tort. In such circumstances the interest of the Federal system in proceeding under its own Rules should have prevailed." 380 U.S., at 476-477.

There is much to be said for uniformity in the definition of "commencement of an action" employed by the the Federal Courts in actions based upon diversity of citizenship. Rule 3 of the Federal Rules of Civil Procedure is very clear in mandating that an action is commenced when there is the physical filing of a complaint with the Clerk of a United States District Court. It should then be up to the court to decide if the defendant in the action is served with process within a reasonable time. As Mr. Justice Black observed in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962):

"When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure."

In *Hanna*, the Court recited language of the Fifth Circuit which reads:

"One of the shaping purposes of the Federal Rules is to bring about uniformity in the Federal Courts by getting away from local rules. This is especially true of matters which relate to the administration of legal

proceedings, an area in which Federal Courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules." *Lumbermen's Mutual Casualty Co. v. Wright*, 380 U.S. 472-473, 322 F.2d 759 (5th Cir. 1963).

CONCLUSION

The case at bar presents the Court a clear-cut choice. If Rule 3 of the Federal Rules of Civil Procedure is to be followed by the Federal Judges of this land in determining when a diversity action is commenced for the purpose of tolling a statute of limitation, petitioner can continue to seek remedy for the injuries he has sustained. If the Court chooses to revitalize *Ragan* and determine that state law should be followed in determining when an action is commenced, petitioner's cause of action is forever lost.

Petitioner respectfully prays that the Court reverse the trial court and the United States Court of Appeals for the Tenth Circuit and remand the case for trial on the merits to the United States District Court for the Western District of Oklahoma.

Respectfully submitted,

MANNERS, CATHCART & LAWTER

By DON MANNERS

1510 North Klein

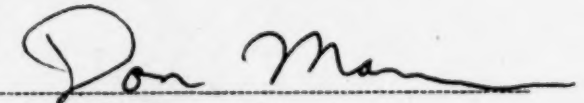
Oklahoma City, Oklahoma 73106

Counsel for Petitioner

November, 1979

CERTIFICATE OF SERVICE

This is to certify that on the 12 day of November, 1979, that the foregoing Brief of Petitioner was served on BURTON J. JOHNSON and RICHARD L. KEIRSEY, of Looney, Nichols, Johnson & Hayes, 219 Couch Drive, Oklahoma City, Oklahoma 73102, attorneys for respondent, by placing same in the United States Mail, postage fully prepaid.



Don Manners